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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 LEAH ZAMORA,

No. Civ. S-05-00789 DFL KJM

12 Plaintiff,

Memorandum of Opinion
and Order

13 v.

14 SACRAMENTO RENDERING COMPANY;
15 LOTHAR LEHMANN; MICHAEL PATRICK
16 KOEWLER,

17 Defendants. /

18 Plaintiff Leah Zamora brings this action against her former
19 employer, Sacramento Rendering Company ("SRC"), her former
20 supervisor, Lothar Lehmann, and SRC's CEO, Michael Patrick
21 Koewler. She alleges sexual harassment, assault, battery,
22 wrongful discharge, and various other mostly duplicative claims.
23 Defendants seek summary judgment. The motion will be GRANTED in
24 part and DENIED in part.
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I. Facts

SRC is a rendering company that processes animal carcasses into meal for products such as dog food and livestock feed. The company uses large volumes of water and, therefore, is required to have an on-site treatment facility.

Zamora started work as an assistant plant manager and safety director at SRC on September 11, 2003. During the period of time covered by the complaint, Lehmann was the plant manager and Zamora's supervisor. Zamora alleges that during the first few months of her employment, Lehmann began staring at her breasts, standing too close, and brushing up against her, all of which made her uncomfortable. Over time, she alleges, Lehmann started touching her in even more inappropriate ways, including at least once stroking her face, touching her body through a slit in her overalls, and grinding against her crotch. She alleges that on one occasion Lehmann tried to kiss her while the two were alone in a trailer, then put his arm across the doorway as if to block her exit. She also alleges that Lehman made inappropriate sexual comments, including asking how much it would cost for a kiss or "something more," stating that he could impregnate her despite his being sixty-eight years old, and asking to see her breast. Zamora claims that she asked Lehmann to stop harassing her, but that she did not report him for some time because she feared losing her job.

1 Meanwhile, Zamora alleges, SRC was underreporting its
2 wastewater flow to the California Regional Water Quality Control
3 Board ("Water Board"). She claims that when she became aware of
4 these alleged violations she expressed her concerns to Lehmann,
5 who told her that "this is why we have insurance."
6

7 On about June 28, 2004, Zamora told Amalia Ramirez, an SRC
8 employee with human resources responsibilities, about Lehmann's
9 alleged harassment. Ramirez informed Richard Wilbur, SRC's
10 Controller. Wilbur spoke with Zamora, asked her to put her
11 complaints in writing, and told her that he would seek advice
12 from SRC's counsel. Wilbur also informed SRC's CEO, Patrick
13 Koewler, of Zamora's complaints.
14

15 Zamora alleges that instead of launching an immediate
16 investigation, Koewler went on vacation for the first few weeks
17 of July 2004. However, she does not dispute Koewler's claim
18 that he interviewed Lehmann on July 1, showed him Zamora's
19 complaint (the contents of which Lehmann denied), and told him
20 not to take any retaliatory action against Zamora. Koewler also
21 moved Zamora's workspace out of the office she had shared with
22 Lehmann, although Lehmann continued to supervise her work.
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25 On September 27, 2004, Koewler informed Zamora that Lehmann
26 denied her allegations and that the investigation had not
27 revealed any witnesses who corroborated her charges. SRC's
28 attorney then asked Zamora to sign a statement that she was

1 satisfied with SRC's response to her complaints. Zamora signed
2 it, she claims, because she feared she would be fired if she did
3 not.
4

5 Koewler then informed Zamora that she would no longer
6 receive overtime hours because the plant's expansion project had
7 been completed. According to Zamora she protested against this
8 change, asserting that ample overtime had been part of her
9 initial employment agreement. She asserts that this action was
10 retaliatory because much of the overtime she had worked until
11 that point in time had not involved the expansion project.
12

13 Koewler also told her that he was instituting a schedule
14 under which Lehmann and Zamora would meet each day at 7:00 a.m.
15 and 2:00 p.m. Zamora claims she expressed her unhappiness with
16 this arrangement, but that Koewler ignored her concerns.
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18 Over the next several days, Zamora claims, Lehmann
19 continued to stare at her breasts and make her feel
20 uncomfortable. As a result, she demanded that Koewler transfer
21 Lehmann out of her presence. Zamora claims that SRC management
22 refused her request and began treating her with hostility.
23

24 On November 4th, after allegedly hearing Lehmann make an
25 off-color comment, Zamora went to speak with Koewler in his
26 office. But instead of addressing her complaints, Zamora
27 alleges, Koewler began angrily interrogating her about reports
28 she had made to the Water Board concerning SRC's wastewater

1 output.¹ Zamora claims Koewler rose to his feet, slammed a file
2 down onto his desk, and stepped towards her aggressively while
3 pointing his finger at her. At the time, Zamora was three to
4 four feet away from Koewler, and a desk stood between them.
5 Zamora left Koewler's office in tears. She now alleges that she
6 was afraid for her physical safety.
7

8 Zamora then informed SRC that although she would not
9 resign, she could not return to work unless SRC made
10 arrangements to keep both Koewler and Lehmann away from her.
11 SRC proposed moving Zamora to a different work shift, allowing
12 her to report to Ramirez, and ensuring that she would never
13 again be alone with Lehmann. Zamora claims that she refused
14 this proposed shift change because it would have conflicted with
15 her childcare responsibilities, entailed a reduction in
16 responsibility, and would have failed adequately to protect her
17 from further harassment. She never returned to work at SRC.
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20 Zamora filed this action on April 21, 2005. Defendants
21 filed this motion for summary judgment on August 9, 2006.
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25 ¹ The validity of Zamora's charge to the Water Board is not
26 at issue in this litigation. Zamora does not contend that there
27 was actually a violation, only that she reasonably believed that
28 there was and acted appropriately in making a report to the
Water Board. SRC denies ever having made false wastewater
reports. According to SRC, Zamora misinterpreted adjustments
made to correct for the effects of rainwater. SRC states that
the district attorney's office has cleared it of any wrongdoing.

1 II. Claims 1 & 2: Hostile Work Environment

2 Zamora brings claims for hostile work environment due to
3 sexual harassment under both Title VII and FEHA. Both statutes
4 prohibit an employer from creating or permitting a work
5 environment in which the conditions are such as to discriminate
6 against employees on the basis of their gender.²

7
8 To establish a prima facie case of sexual harassment under
9 either Title VII or FEHA, an employee must prove "(1) that [she]
10 was subjected to verbal or physical conduct of a harassing
11 nature, (2) that this conduct was unwelcome, and (3) that the
12 conduct was sufficiently severe or pervasive to alter the
13 conditions of the victim's employment and create an abusive
14 working environment." Pavon v. Swift Trans. Co., Inc., 192 F.3d
15 902, 908 (9th Cir. 1999); Meritor Sav. Bank FSB, 477 U.S. at 67;
16 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81
17 (1998); see also Lyle v. Warner Bros. Television Prod., 38 Cal.
18 4th 264 (2006)(noting that standards for hostile work
19 environment sexual harassment claims under FEHA are identical to
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24 ² Title VII of the Civil Rights Act of 1964 makes it
25 unlawful for an employer to "discriminate against any individual
26 with respect to his compensation, terms, conditions, or
27 privileges of employment, because of such individual's race,
28 color, religion, sex, or national origin." 42 U.S.C. 2000e-
2(a)(1)). Similarly, under FEHA, it is unlawful for an employer
"because of the . . . sex . . . of any person, . . . to
discriminate against the person in compensation or in terms,
conditions, or privileges of employment . . . or harass an
employee." Cal. Gov. Code § 12940(a), (j)(1).

1 those under Title VII). The "sexually objectionable environment
2 must be both objectively and subjectively offensive, one that a
3 reasonable person would find hostile or abusive, and one that
4 the victim in fact did perceive to be so." Faragher v. City of
5 Boca Raton, 524 U.S. 775, 787 (1998) (citation omitted).

7 "[S]imple teasing, offhand comments, and isolated incidents
8 (unless extremely serious) will not amount to discriminatory
9 changes in the 'terms and conditions of employment.'" Id. at
10 788 (internal citation omitted).

12 Defendants argue that Lehmann's alleged harassing acts were
13 "vague, sporadic, isolated and trivial," and therefore
14 insufficiently severe or pervasive to create a hostile work
15 environment. They cite a number of cases in which federal and
16 California courts have found workplace conduct to be
17 insufficiently severe or pervasive to create a hostile work
18 environment. None of these cases, however, involved conduct as
19 severe and pervasive as that which Zamora alleges here. For
20 instance, in Kortan v. Calif. Youth Auth., the Ninth Circuit
21 held that a supervisor's largely isolated flurry of misogynistic
22 comments was insufficient to create an objectively hostile work
23 environment. 217 F.3d 1104, 1108-10 (9th Cir. 2000). In so
24 holding, the court emphasized that the defendant's comments were
25 made mainly on a single day and were not directed at the
26 plaintiff. Id. at 1110. In contrast, Zamora alleges that
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1 Lehmann consistently engaged in sexual misconduct aimed directly
2 at her for nearly two years. Moreover, Lehmann's alleged
3 misconduct includes highly inappropriate physical touching,
4 something which was not alleged in Kortan.
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6 Defendants also cite Manatt v. Bank of America, where the
7 Ninth Circuit held that a few racially insensitive "offhand
8 comments" and incidents of "simple teasing" spread over two-and-
9 a-half years did not alter the conditions of plaintiff's
10 employment. 339 F.3d 792, 799 (2003). But as with Kortan,
11 Manatt does not help SRC because Zamora alleges much more severe
12 and frequent incidents of harassment.
13

14 Lehmann's alleged misconduct was repeated,³ unwelcome,⁴
15 spanned a significant period of time, and indicated a sexual
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18 ³ Defendants contend that in her deposition Zamora
19 identified "only" six incidents in which Lehmann touched her
20 inappropriately, and that only in her subsequent declaration did
21 she claim that Lehmann touched her inappropriately at least once
22 a week from November 2003 through March or April 2004. Citing
23 Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999),
24 defendants argue that Zamora cannot create an issue of material
25 fact by submitting a declaration that contradicts her deposition
26 testimony. But defendants have not pointed to anything in
27 Zamora's deposition indicating that there were no more than six
touching incidents. That she may have identified six incidents
is not necessarily an admission that there were not more. More
important, even if there were "only" six incidents of touching,
a reasonable jury could find that Lehman's alleged conduct
created a hostile work environment.

28 ⁴ Defendants contend that Zamora welcomed Lehmann's alleged
harassment because she admits sharing personal information with
Lehmann, loaning him a copy of "American Pie," sending an e-mail

1 interest in Zamora. As such, a reasonable jury could find that
2 Lehman's conduct created a hostile work environment.

3 In the alternative, SRC claims a complete defense to a
4 sexual harassment claim under Farragher v. City of Boca Raton.
5 In Farragher the Court held that as long as no "tangible
6 employment action" has been taken against the plaintiff, an
7 employer has an affirmative defense where (a) it "exercised
8 reasonable care to prevent and correct promptly any sexually
9 harassing behavior, and (b) . . . the plaintiff employee
10 unreasonably failed to take advantage of any preventive or
11 corrective opportunities provided by the employer or to avoid
12 harm otherwise." 524 U.S. 775, 807-08 (1998). This defense is
13 available under both Title VII and FEHA. Kohler v. Inter-Tel
14 Tech., 244 F3d 1167, 1176 (9th Cir. 2001).

15 Defendants assert that Zamora suffered no "tangible
16 employment action," which the Supreme Court has defined as "a
17 significant change in employment status, such as hiring, firing,
18 failing to promote, reassignment with significantly different
19 responsibilities, or a decision causing significant change in
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25 to his wife mentioning "saggy boobs," using swear words,
26 laughing with Lehmann about a picture depicting a nudist colony,
27 accepting a \$600 loan from Lehmann, once hugging Lehmann, and
28 failing to complain promptly about Lehmann's alleged
inappropriate conduct. But while these facts may be sufficient
for the jury to conclude that Lehmann's conduct was welcome,
they do not make the contrary conclusion unreasonable.

1 benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742,
2 761 (1998). Defendants further assert that they acted with
3 reasonable care and that Zamora was unreasonable in refusing
4 their corrective plan.
5

6 In response, Zamora contends that she suffered two tangible
7 adverse employment actions: (1) reduction of overtime and (2) a
8 proposed package of unfavorable job changes if she continued to
9 insist on separation from Lehman. As to the overtime, on
10 September 27, 2004, Koewler told Zamora that her overtime hours
11 would be cut because the expansion project was finished. He
12 also told her that the decision to cut her hours had been
13 Lehmann's. Zamora avers that most of her overtime hours before
14 September 27 had been spent in connection with tasks unrelated
15 to the expansion project. She contends that the decision to cut
16 her overtime was retaliatory. As to the package of unfavorable
17 job changes, Zamora contends that SRC's proposed "solution" to
18 Lehman's improper conduct was to offer her a demotion and a less
19 desirable shift.
20
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22 Zamora has presented sufficient evidence to permit
23 reasonable jurors to conclude that Koewler's decision to take
24 away Zamora's overtime was retaliatory. If it was, it qualifies
25 as a tangible employment action under Ellerth, and SRC's
26 Farragher defense would fail. As to the changed work schedule
27 offered to keep Zamora and Lehman apart, plaintiff
28

1 presents sufficient evidence from which a jury could find either
2 an adverse employment action or that Zamora acted reasonably in
3 rejecting the corrective proposal.
4

5 Finally, Zamora contends that after she complained, SRC
6 forced her to continue spending time with her alleged harasser
7 every day, sometimes alone. A reasonable jury might find SRC's
8 corrective response inadequate.

9 For these reasons, SRC cannot establish a Farragher defense
10 on summary judgment. Accordingly, summary judgment for
11 defendants on claims one and two is DENIED.
12

13 III. Claim No. 3: Failure to Prevent under FEHA

14 Zamora claims that SRC and Koewler violated FEHA by failing
15 "to take all reasonable steps necessary to prevent
16 discrimination and harassment from occurring." Cal. Gov. Code §
17 12940(k). Although SRC did have a formal anti-sexual harassment
18 policy in place, Zamora contends that SRC and Koewler did not
19 take adequate steps to prevent further harassment once she
20 complained. She says that she signed the statement absolving
21 SRC only because she felt compelled to do so and not because she
22 agreed with the contents. For the reasons discussed in the
23 preceding section, there are sufficient facts alleged calling
24 into question whether SRC adequately prevented further
25 harassment after Zamora's first complaint. Accordingly, summary
26 judgment for SRC on the third claim is DENIED.
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1 However, defendants correctly assert that a supervisory
2 employee is not liable under FEHA for failing to prevent
3 harassment by a subordinate employee. Fiol v. Doellstedt, 50
4 Cal. App. 4th 1318, 1326 (1996). Therefore, summary judgment is
5 GRANTED to Koewler on Zamora's third claim for relief.
6

7 IV. Claim No. 4: Wrongful Discharge (Harassment)

8 Zamora claims that she was constructively discharged in
9 violation of the public policy that favors reporting sexual
10 harassment. To prevail, she must prove that she was
11 constructively discharged in violation of a public policy that
12 is (1) fundamental, (2) beneficial for the public, and (3)
13 embodied in a statute or constitutional provision. Turner v.
14 Anheuser-Busch, Inc., 7 Cal 4th 1238, 1256 (1994) (citations
15 omitted).
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18 "Constructive discharge occurs when the employer's conduct
19 effectively forces an employee to resign." Id. at 1244. The
20 plaintiff must prove that "under all the circumstances, the
21 working conditions are so unusually adverse that a reasonable
22 employee in plaintiff's position would have felt compelled to
23 resign." Id. at 1247. Zamora alleges that SRC constructively
24 discharged her by taking inadequate steps to prevent Lehmann
25 from continuing to harass her. Moreover, Zamora contends that
26 SRC's offer to have her report to Ramirez would have required
27 her to work a less desirable shift and accept a position with
28

1 less responsibility. She also claims that SRC's proposal would
2 not have protected her adequately from further encounters with
3 Lehmann. There is an adequate factual basis for Zamora's
4 contention that she was constructively discharged such that this
5 issue cannot be resolved on summary judgment.
6

7 Zamora also must prove that she was discharged in violation
8 of a "firmly established, fundamental, and substantial" public
9 policy. Foley v. Interactive Data Corp., 254 Cal. 3d 654, 671
10 n.11 (1988) (citations and internal quotation marks omitted).
11 Antidiscrimination laws such as FEHA unquestionably satisfy this
12 requirement. See Cal. Gov. Code § 12920 ("It is hereby declared
13 as the public policy of this state that it is necessary to
14 protect and safeguard the right and opportunity of all persons
15 to seek, obtain, and hold employment without discrimination on
16 account of . . . sex."). Discharging an employee in retaliation
17 for reporting sexual harassment violates California public
18 policy. Barton v. New United Motor Mfg., Inc., 43 Cal. App. 4th
19 1200, 1208-09 (1996).
20
21

22 Finally, defendants contend that Zamora has failed to show
23 that she left her job as a result of the alleged harassment.
24 Rather, they assert, she left because SRC refused her lawyer's
25 demand for \$175,000. This is a jury question.
26

27 For these reasons, summary judgment for defendants on the
28 fourth claim is DENIED.

1 V. Claim Nos. 5 & 6: Negligent Supervision and Management

2 Zamora brings claims against SRC and Koewler for negligent
3 hiring, supervision, training, and retention of Lehmann, and for
4 breaching its duty "to manage its facilities in a lawful manner
5 and to refrain [sic] its employees and supervisors from
6 committing . . . sexual harassment."

7
8 Workers' compensation law bars negligence claims by
9 employees against their employers. See Coit Drapery Cleaners,
10 Inc. v. Sequoia Ins. Co., 14 Cal. App. 4th 1595, 1605-06 (1993).
11

12 Zamora asserts that her claims are not barred by workers'
13 compensation exclusivity because defendants' misconduct was
14 intentional and against public policy. There is indeed an
15 exception to workers' compensation exclusivity for intentional
16 employer misconduct. See Vuillemainroy v. American Rock &
17 Asphalt, Inc., 70 Cal. App. 4th 1280, 1284 (1999). But Zamora's
18 claims are for negligence, which, by definition, is not
19 intentional. Thus, these claims do not fall within the
20 exception. See Coit Drapery, 14 Cal. App. 4th at 1606 (stating
21 that workers' compensation laws would bar negligent supervision
22 claim by harassed employee). Accordingly, summary judgment for
23 defendants on Zamora's fifth and sixth claims is GRANTED.
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26 VI. Claims 7 & 8: Assault and Battery

27 Zamora claims that Lehmann and Koewler assaulted and
28 battered her. "In order to state a cause of action for assault a

1 plaintiff must establish (1) that defendant intended to cause
2 harmful or offensive contact, or the imminent apprehension of
3 such contact, and (2) that plaintiff was put in imminent
4 apprehension of such contact. Brooks v. United States, 29
5 F.Supp.2d 613, 617 (N.D. Cal. 1998) (citing Restatement (Second)
6 of Torts § 21). "An actor is subject to liability to another
7 for battery if (a) he acts intending to cause a harmful or
8 offensive contact with the person of the other or a third
9 person, or an imminent apprehension of such a contact, and (b) a
10 harmful contact with the person of the other directly or
11 indirectly results." Restatement (Second) of Torts § 13.

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14 As to Koewler, Zamora alleges that he put her in
15 apprehension of harmful or offensive contact during their
16 November 4, 2004 meeting. However, the alleged facts are not a
17 sufficient basis from which a reasonable jury could find Koewler
18 liable for assault. Getting angry and yelling at an employee
19 may be rude and upsetting, but it is not assault. "Words do not
20 make the actor liable for assault unless together with other
21 acts or circumstances they put the other in reasonable
22 apprehension of an imminent harmful or offensive contact with
23 his person." Restatement (Second) of Torts § 31; see Brooks v.
24 United States, 29 F.Supp.2d 613, 617 (N.D. Cal. 1998) ("Assault
25 is a tort of specific intent; a plaintiff must prove that
26 defendant intended to place plaintiff in a reasonable
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1 apprehension of harmful or offensive contact."). There is no
2 showing here that Koewler placed Zamora in reasonable
3 apprehension of "imminent" physical contact, or that he intended
4 to do so. Although he allegedly got angry, raised his voice,
5 dropped a file on his desk and pointed his finger, he never
6 raised a hand as if to strike nor did he use threatening
7 language. If the alleged facts here amount to assault, then any
8 angry confrontation between two people becomes an assault. This
9 is not the law. See Restatement (Second) of Torts § 31.
10 Further without contact, there can be no battery. The court
11 therefore GRANTS summary judgment for Koewler on the seventh and
12 eighth claims.

13
14
15 Zamora's assault and battery claims against Lehmann are
16 another matter. Zamora alleges that Lehmann repeatedly touched
17 her in an offensive manner. Accepting these allegations as
18 true, a reasonable jury could find that Lehmann assaulted and
19 battered Zamora. Accordingly, summary judgment for Lehmann on
20 claims seven and eight is DENIED.

21
22 Finally, defendants provide no support for their assertion
23 that SRC may not be held vicariously liable for Lehmann's
24 intentional torts. Thus, summary judgment for SRC on the
25 seventh and eighth claims is DENIED.
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VII. Claim 9: Ralph Act

Zamora claims that defendants violated the Ralph Act, which prohibits "violence, or intimidation by threat of violence . . . on account of . . . sex." Cal. Civ. Code §§ 51.7, 51(b).

It takes actual violence or the threat of violence to state a claim under the Ralph Act. Winarto v. Toshiba America Elec. Components, Inc., 274 F.3d 1276, 1289 (9th Cir. 2001). Zamora alleges that Lehmann intimidated her by implicitly threatening violence when he allegedly attempted to kiss her and then to block her from exiting the room. She alleges that when he blocked her way, she was afraid Lehmann was going to hurt her physically.

Under Winarto, the question is whether "a reasonable person, standing in the shoes of the plaintiff, [would] have been intimidated by the actions of the defendant and perceived a threat of violence." Id. (citation omitted) More specifically, the question is whether a reasonable woman in Zamora's position would have been intimidated and perceived a threat of violence. Id. (citation omitted).

Zamora's allegations against Lehmann suffice to create a triable issue as to whether a reasonable woman in her position would have perceived a threat of violence when Lehmann allegedly barred the trailer door with his arm. In her deposition, Zamora states that she had no difficulty moving past Lehmann's arm,

1 that he did not make any further attempt to detain her, that he
2 did not touch her as she left, and that he did not follow or
3 chase her. She also states that Lehmann never verbally
4 threatened her. Nevertheless, the gesture of blocking someone's
5 exit might reasonably be perceived as a threat of violence. The
6 court cannot conclude as a matter of law that a reasonable woman
7 would not perceive a threat of violence in Lehmann's alleged
8 conduct. This is a question for the jury. Accordingly, summary
9 judgment for Lehmann and SRC on the ninth claim is DENIED.⁵
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12 Zamora's Ralph Act claim does not specifically mention
13 Koewler or specify how his alleged conduct violated the Ralph
14 Act. Nor does plaintiff's opposition to the instant motion
15 discuss a Ralph Act claim against Koewler. Nevertheless, the
16 complaint states that the Ralph Act claim is brought against all
17 defendants.
18

19 The only allegations against Koewler that possibly could
20 implicate the Ralph Act concern his alleged conduct at the
21 November 4, 2004 meeting with Zamora. For the same reasons
22 discussed above in the assault context, however, a reasonable
23 woman in Zamora's position would not have interpreted Koewler's
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27 ⁵ Because there is a triable issue as to whether Lehmann
28 intimidated Zamora by threat of violence, the court does not
consider whether any of Lehmann's alleged unwelcome touchings
constituted "violence" within the meaning of the Ralph Act.

1 alleged conduct as threatening violence. Accordingly, summary
2 judgment is GRANTED on Zamora's Ralph Act claim against Koewler.

3
4 VIII. Claim 10: Violation of the Bane Act

5 Zamora alleges that Koewler's conduct at the November 4,
6 2004 meeting violated the Bane Act, which creates a cause of
7 action against anyone who "interferes by threats, intimidation,
8 or coercion, or attempts to interfere by threats, intimidation,
9 or coercion, with the exercise or enjoyment by any individual or
10 individuals of rights secured by the Constitution or laws of the
11 United States, or of the rights secured by the Constitution or
12 laws of this state." Cal. Civ. Code § 52.1. Specifically, she
13 alleges that "Koewler, by his intimidation of Plaintiff through
14 the threat of physical violence, interfered or attempted to
15 interfere with Plaintiff's exercise or enjoyment of her right to
16 be free from sexual harassment and retaliation."
17
18

19 Zamora has not presented evidence that Koewler threatened
20 or coerced her. It is a somewhat closer question as to whether
21 Koewler's conduct could be deemed intimidation.⁶ But Zamora has
22 not presented any evidence that Koewler's intimidation, if any,
23 deprived her or was intended to deprive her of any legal right.
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26 ⁶ "There is no definitive definition of the word
27 'intimidation' in California law. In common parlance,
28 'intimidation' means 'to make timid or fearful.'" Harold E.
Kahn & Robert D. Links, California Civil Practice Civil Rights
Litigation § 3:19 (2006) (quoting Ex parte Bell, 19 Cal. 2d 488,
526 (1942)).

1 See Jones v. Kmart Corp., 17 Cal. 4th 329, 334 (1998) (stating
2 that Bane Act violation requires "attempted or completed act of
3 interference with a legal right, accompanied by a form of
4 coercion."). Zamora does not allege that Koewler intimidated
5 her into performing or not performing any particular action.
6 Any intimidation Koewler's anger might have caused could not
7 have prevented Zamora from making a report of alleged wrongdoing
8 she had already made. Nor is there evidence that Koewler's
9 anger had anything to do with Zamora's sexual harassment
10 allegations against Lehmann, or that it was intended to or did
11 prevent future complaints. In short, Zamora has failed to
12 present any evidence that Koewler's alleged display of anger
13 interfered with her legal rights. Accordingly, summary judgment
14 for Koewler is GRANTED on the tenth claim.
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18 On the other hand, as already discussed, a triable issue
19 exists as to whether Lehmann intimidated Zamora when he
20 allegedly moved to block her exit. A jury might find that
21 Lehmann intimidated Zamora in an effort to interfere with her
22 right to work in an environment free of discrimination based on
23 sex. Accordingly, summary judgment for Lehmann and SRC is
24 DENIED as to the tenth claim.
25

26 IX. Claim 11: Wrongful Discharge (Wastewater)

27 Zamora claims that SRC wrongfully discharged her because
28 she told the Water Board that SRC was not properly reporting its

1 wastewater flow numbers. Zamora alleges that she informed the
2 authorities of her suspicions regarding SRC's wastewater
3 reporting on November 4, 2004 - the last day she worked at SRC -
4 and that this was the reason Koewler became angry with her that
5 day. As already discussed, Zamora has alleged facts from which
6 a reasonable jury might find that she was constructively
7 discharged. A reasonable jury also might find that SRC
8 constructively discharged her in retaliation for taking her
9 concerns to the authorities. Accordingly, summary judgment is
10 DENIED on Zamora's eleventh claim.

13 X. Claim 12: Constructive Discharge

14 Zamora brings a claim for constructive discharge.
15 Constructive discharge is not itself a cause of action under
16 California law. See Turner, 7 Cal. 4th at 1251 ("Even after
17 establishing *constructive* discharge, an employee must
18 independently prove a breach of contract or tort in connection
19 with employment termination in order to obtain damages for
20 *wrongful discharge*.") (emphasis original and citation omitted).
21 Accordingly, summary judgment is GRANTED to SRC on the twelfth
22 claim.

25 XI. Punitive Damages

26 Zamora seeks punitive damages against all defendants. To
27 recover punitive damages, Zamora must establish oppression,
28

1 fraud or malice by clear and convincing evidence. See Cal. Civ.
2 Code § 3294(a).

3 Zamora persuasively argues that reasonable jurors could
4 find by clear and convincing evidence that Lehmann's alleged
5 conduct was oppressive or malicious. Accordingly, summary
6 judgment on punitive damages against Lehmann is DENIED.
7

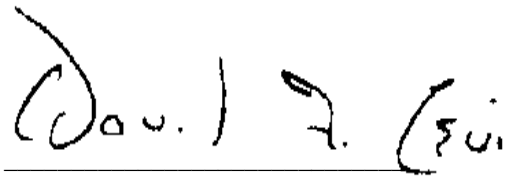
8 On the other hand, Zamora has failed to allege facts from
9 which reasonable jurors could be clearly convinced that Koewler
10 or SRC ratified Lehmann's alleged sexual harassment. Punitive
11 damages may be awarded against a corporate employer based on the
12 conduct of an employee only if it had "advance knowledge of the
13 unfitness of the employee and employed him or her with a
14 conscious disregard of the rights or safety of others or
15 authorized or ratified the wrongful conduct." Cal. Civ. Code §
16 3294; see also Coll. Hosp., Inc. v. Superior Court, 8 Cal. 4th
17 704, 724 n.11 (1994) ("Punitive damages are not assessed against
18 employers on a pure respondeat superior basis. Some evidence of
19 fault by the employer itself is also required."). Even if
20 Koewler and SRC failed to respond adequately to Zamora's
21 allegations against Lehmann, Zamora's allegations do not support
22 the conclusion that Koewler or SRC "authorized" or "ratified"
23 Lehmann's alleged harassment. Accordingly, the court GRANTS the
24 motion for summary judgment with respect to punitive damages
25 against Koewler and SRC.
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CONCLUSION

As discussed above, defendants' motion for summary judgment is DENIED on claims one and two; DENIED as to SRC and GRANTED as to Koewler on claim three; DENIED on claim four; GRANTED on claims five and six; GRANTED as to Koewler and DENIED as to Lehmann and SRC on claims seven and eight; GRANTED as to Koewler and DENIED as to Lehmann and SRC on claim nine; GRANTED as to Koewler and DENIED as to Lehmann and SRC on claim ten; DENIED as to claim eleven; GRANTED on claim twelve; DENIED as to punitive damages for Lehmann and GRANTED as to punitive damages for Koewler and SRC.

IT IS SO ORDERED.

Dated: 1/16/2007

A handwritten signature in black ink, appearing to read "David F. Levi". The signature is written in a cursive, somewhat stylized font.

DAVID F. LEVI
United States District Judge